No. 614

CHRIS LARSEN, PETITIONER,

vs.

NORTHLAND TRANSPORTATION CO[RP]-
PORATION, CHARTERER OF THE AMERICAN
VESSEL "*NORCO*," RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
THE UNITED STATES CIRCUIT COURT
APPEALS FOR THE NINTH CIRCUIT
BRIEF IN SUPPORT THEREOF

GEORGE F. VANDEVERE
SAMUEL B. BASSETT,
Proctors for Petitioner.
511 Alaska Building, Seattle, Washington.

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Supreme Court of the United States

October Term 1933

CHRIS LARSEN, PETITIONER,

vs.

NORTHLAND TRANSPORTATION CO., A CORPORATION, CHARTERER OF THE AMERICAN MOTOR VESSEL "*NORCO*," RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable Supreme Court of the United States:

The petition of Chris Larsen respectfully shows:

I.

Statement of Matter Involved

Proceedings Had in the State Court.

The petitioner, a seaman, commenced an action against the respondent, his employer, in the Superior Court of the State of Washington for King County,

under the Merchant Marine Act of 1920, Section 33, Chap. 250; Title 46, U. S. C. A., Section 688, to recover damages from the respondent as the alleged owner of the motor vessel "NORCO," for personal injuries sustained through the negligence of a winchman (Ap. 19-22).

The respondent's answer denied generally the allegations of the complaint and pleaded both contributory negligence and assumed risk as affirmative defenses.

Nowhere in its answer did the respondent allege that it was merely the *charterer* of the motor vessel "NORCO" and not the *owner* as alleged in the complaint, *nor did it plead its right to a limitation of liability as a partial defense.* (Ap. 23-24.) The petitioner's reply denied the allegations of these affirmative defenses (Ap. 25), and on the issues so framed, the case proceeded to trial, the jury returned a verdict in favor of the petitioner in the sum of $12,500, and in due course a judgment for that amount was entered in petitioner's favor (Ap. 4), from which judgment no appeal was taken to the highest court of the state.

Proceedings Had in the United States District Court.

After the judgment had been entered in the State Court, the respondent, as the alleged charterer of

the "NORCO," filed in the United States District Court its petition for limitation of liability under the Revised Statutes of United States, Sections 4282 to 4289; 46 U. S. C. A. Sections 183, 185, 186, praying that it be exempted from all liability, or, in the alternative, that its liability be limited to the amount of its interest in the "NORCO," alleged to be not more than $4651.98 (Ap. 2-10), and secured an ex parte order directing the issuance of a monition restraining the petitioner herein, from proceeding further with his action in the state court and from issuing a writ of execution on the judgment obtained therein. (Ap. 10-13.)

The respondent's petition for limitation of liability, which is in the usual form, nowhere alleges that there were any claims other than Larsen's the petitioner herein, nor that the respondent feared any other claims. (Ap. 2 to 7.) On the contrary, the nature of the accident as described in respondent's petition for limitation of liability, indicates that no other claims could possibly exist (Ap. 4); and, as was recited in the order of the District Court, dismissing the petition:

> "* * * No other claim has been filed in response to the monition, and the time for filing claims having expired on the 10th day of November, 1932, and the petitioner (respondent)

has not shown, or contended that other claims exist * * *." (Ap. 33.)

Your petitioner filed exceptions to the petition for limitation of liability (Ap. 16) and also demurred to, and moved to dismiss it (Ap. 17) on the ground that, there being only one claimant and one charterer, the state court had jurisdiction and was competent to grant the respondent the relief sought in the United States District Court; and that, by its failure to claim the benefit of the Limited Liability Act by proper pleading in the state court, the respondent had waived its right to such relief, and the issue had become *res judicata*. On the authority of *Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520 (1931), and subsequent proceedings therein, *Ex Parte Green*, 286 U. S. 437, 52 S. Ct. 602, 76 L. Ed. 1212 (1932), the District Court held that by the judgment in the state court the respondent's claim to limitation of liability had become *res judicata* (Ap. 28-31) and, accordingly, dismissed the respondent's petition (Ap. 32-34). In so holding the District Court said, in part;

> "The state court being competent to give common law remedy and having jurisdiction to determine the value of the charterer's interest in the vessel, he being the only claimant, and the claim could, with propriety, have been determined in that suit, it was his duty to plead the limitation of liability, if any, to the value of his interest, in the ship. An adequate remedy was avail-

able and not put forward, and escape from the judgment which followed cannot be made. American Surety Co. v. Baldwin (U. S.), 53 S. Ct. 98, 77 L. Ed. ___, decided November 14, 1932. Compare Mitchell v. First National Bank of Chicago, 180 U. S. 471, 21 S. Ct. 418, 45 L. Ed. 627; Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77, 90, 43 S. Ct. 480, 67 L. Ed. 871. The judgment upon the merits is res judicata not only as to the issue presented, but also as to rights and issues which might have been presented. Baltimore Steamship Co. v. Phillips, 274 U. S. 316; 47 S. Ct. 600, 71 L. Ed. 1069. See, also, United States v. Sakharam Ganesh Pandit (C. C. A.), 15 F. (2d) 285, certiorari denied, 273 U. S. 759, 47 S. Ct. 473, 71 L. Ed. 878.

"The petitioner was not at liberty to present his defense by piecemeal and litigate the liability in the state court. Werlein v. New Orleans, 177 U. S. 390; 20 S. Ct. 682, 44 L. Ed. 817; United States v. California & Oregon Land Company, 192 U. S. 355, 24 S. Ct. 266, 48 L. Ed. 476; Grubb C. Public Utilities Comm., 281 U. S. 470, 479, 50 S. Ct. 374, 74 L. Ed. 972. See, also, American Surety Co. v. Baldwin, supra."

(1 Fed. Supp. 933; Ap. 30.)

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit on Appeal.

Following the decree of the District Court the respondent appealed therefrom to the United States Circuit Court of Appeals for the Ninth Circuit (Ap. 34). The matter came on for argument before the Honorable Curtis D. Wilbur, William H. Sawtelle and

Francis A. Garrecht, Circuit Judges, at the October Term, 1932, at San Francisco, California, on the 31st day of May, 1933.

On the 21st day of August, 1933, the Honorable Circuit Court of Appeals filed its Opinion herein (Ap. 53-60), reported in 66 F. (2d) 651, reversing the judgment of the District Court and remanding the cause for further proceedings in accordance therewith. Omitting the Court's statement of the case and portions of the Opinion which do not deal strictly with the jurisdictional question involved, the opinion is as follows:

> "The District Court sustained the appellee's contentions and dismissed the proceedings upon the ground, as stated in the order of dismissal, that by its failure to make any claim of its right to limit its liability in the common law action in the Superior Court the petitioner waived such right, and that all matters pertaining to the merits of said common law action including petitioner's right to limit its liability were res adjudicata. Petitioner appeals from the decree of dismissal. (Ap. 55.)
>
> * * *
>
> "This contention is based on the principle that a judgment estops the parties not only as to all things which were in fact adjudicated therein, but also all things which might have been adjudged therein.
>
> "Parties are not required to set up and litigate rights over which the court had no jurisdiction in order to protect themselves in enforcing their

rights in a court which has jurisdiction. Ash Sheep Co. v. United States, 252 U. S. 159; T. B. Harms & Francis, Day & Hunter v. Stern, 229 Fed. 42; 34 C. J. 935, Sec. 1339.

"We conclude that the judgment of the Superior Court fixing the amount of the claimant's injuries and awarding a judgment for the value thereof is not res adjudicata as to the right of the owner, by appropriate proceedings in an admiralty court, to limit the recovery to the value of the vessel, etc., where there was no attempt to raise that question in the Superior Court. We need go no further in this matter.

"The remaining question, if it is a separate and distinct question, is as to whether or not the owner who has the right to set up its claim to the limitation of liability in the state court is deemed to have waived that right by reason of its failure so to do and by reason of allowing the case to proceed to judgment without at any time invoking the principle of limited liability. We are unable to perceive upon what ground a waiver can be predicated where the owner was under no obligation to submit to the Superior Court its claim to a limitation of liability over which that court had no jurisdiction. (Ap. 58-59.) * * * We conclude then, that there is nothing in the decisions of the Supreme Court in Langnes v. Green, supra, or Ex Parte Green, supra, inconsistent with the right of the appellant to subsequently litigate the question of limitation of liability in the admiralty court, on the contrary that this is the purport and effect of those decisions." (Ap. 59-60.)

Thereafter, on the 18th day of September, 1933, your petitioner filed a petition for rehearing (Ap.

62) pointing out that the Circuit Court of Appeals in said opinion had clearly and unequivocally held that the United States District Courts have *exclusive* jurisdiction to entertain a shipowner's claim for limitation of liability and that the state courts are without jurisdiction to afford him such relief; and that said holding is squarely contrary to the decisions of this Honorable Court in *Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 521, *supra*, and *Ex Parte Green*, 286 U. S. 437, 52 S. Ct. 602, 76 L. Ed. 1212, *supra*. On October 30, 1933, the Circuit Court of Appeals denied the petition for rehearing (Ap. 62) but entered an order staying the issuance of mandate to and including December 4, 1933, to enable your petitioner to apply to this Court for a Writ of Certiorari (Ap. 62-63).

II.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals for the Ninth Circuit has rendered a decision probably in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Re Putnam*, 55 F. (2d) 73, certiorari denied (1932), 286 U. S. 558, 52 S. Ct. 641, 76 L. Ed. 1292.

2. The Circuit Court of Appeals has decided an important question of federal and maritime law, involving the *jurisdiction* of the state courts to limit a shipowner's liability in certain cases, in a way probably untenable and in direct conflict with the applicable decisions of this Court in the following cases:

Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 66 L. Ed. 927.

Langnes v. Green, 282 U. S. 531, 75 L. Ed. 520, *supra*.

Ex Parte Green, 286 U. S. 437, 76 L. Ed. 1212, *supra*.

3. The Circuit Court of Appeals held that *the respondent was not obliged to claim its right to a limited liability in the state court because that court had no jurisdiction to afford it such relief* and, therefore, concluded that the judgment of the state court was not *res judicata* of this issue. In the course of the opinion the Circuit Court made no less than three statements, each of which clearly indicates that such is that court's view of the law:

> "The net result of these two decisions (Langnes v. Green, supra, and Ex Parte Green, supra), is that the Supreme Court holds that the District Court sitting in admiralty has *exclusive* jurisdiction to determine all the questions involved in a proceeding for the limitation of liability. (Ap. 57.)

> "Parties are not required to set up and litigate rights over which the court had no jurisdiciton in order to protect themselves in enforcing their rights in a court which has jurisdiction. (Ap. 58.)
>
> "We are unable to perceive upon what ground a waiver can be predicated where the owner was under no obligation to submit to the Superior Court its claim to a limitation of liability over which that court had no jurisdiction." (Ap. 59.)

That this holding is squarely in conflict with the decision of this Honorable Court in *Langnes v. Green, supra*, can readily be demonstrated by reference to a few controlling statements therein:

> "In this situation, while there is some conflict among the decisions of the lower federal courts, this court has accepted the view that, 'in a state court, when there is only one possible claimant and one owner, the advantage of this section (Sec. 4283, U. S. C., Title 46, Sec. 183) may be obtained by proper pleading. The Lotta (D. C.), 150 Fed. 219, 222, Delaware River Ferry Co. v. Amos (D. C.), 179 Fed. 756.' Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 260, 66 L. Ed. 927, 930, 42 S. Ct. 475. See, also, American S. B. Co. v. Chase, 16 Wall. 522, 532, 533, 21 L. Ed. 369, 372." (282 U. S. 531, 540, 75 L. Ed. 520, 526.)

In the same case, with reference to the jurisdiction of the state courts your Honors further said:

> "Upon the present record, the necessary result of this holding is that the state court, in the action there pending and in the due course of the

exercise of its common law powers, was competent to entertain a claim of the shipowner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject. * * * Upon the face of the record the state court, whose jurisdiction already had attached, was competent to afford relief to the petitioner" (ship owner). (282 U. S. 531, 540, 541, 75 L. Ed. 520, 526).

4. If the respondent could have claimed its right to a limited liability in the state court but failed to do so, that issue is now clearly *res judicata*, and the decision of the Circuit Court of Appeals on that question is in conflict with the decisions of this Court in the following cases, holding that a litigant is not at liberty to prosecute his rights by piecemeal and that "'a judgment upon the merits in one suit is res judicata in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end":

Grubb v. Public Utilities Comm., 281 U. S. 470, 74 L. Ed. 979.

Werlein v. New Orleans, 177 U. S. 390, 398, *et seq.*, 44 L. Ed. 817, 830, 20 Sup. Ct. Rep. 682.

United States v. California & O. Land Co., 192 U. S. 355, 358, 48 L. Ed. 476, 478, 24 Sup. Ct. Rep. 266.

Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 319, 71 L. Ed. 1069, 1071, 47 Sup. Ct. Rep. 600.

United States v. Moser, 266 U. S. 236, 241, 69 L. Ed. 262, 264; 45 Sup. Ct. Rep. 66.

Cromwell v. Sac. County, 94 U. S. 351, 352, 74 L. Ed. 195, 197.

5. For the further reasons advanced in the brief supporting this application your petitioner is advised and believes that the determination of the Circuit Court of Appeals in the case at bar was erroneous and in conflict with the decisions of this Honorable Court construing the Limited Liability Act, with reference to the jurisdiction of the state courts.

WHEREFORE your petitioner respectfully prays that a Writ of Certiorari may be issued under the seal of this Honorable Court directing the Circuit Court to certify to this Court a full and complete transcript of the record of all proceedings of said court in said cause entitled on its docket, Northland Transportation Co., a corporation, Charterer of the American Motor Vessel "NORCO," appellant, v. Chris Larsen, appellee, No. 7036, to the end that said cause may be reviewed and determined by this Court as provided by law.

GEORGE F. VANDERVEER,
SAMUEL B. BASSETT,
Proctors for Petitioner.

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

SAMUEL B. BASSETT, being first duly sworn, deposes and says that he is one of the proctors for petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes the same to be true.

SAMUEL B, BASSETT.

Subscribed and sworn to before me this 20th day of November, 1933.

G. F. VANDERVEER,

[SEAL] *Notary Public in and for the State of Washington, residing at Seattle.*

I hereby certify that I have examined the foregoing petition, and that in my opinion the petition is well founded in law as well as in fact and not interposed for delay, and that the case is one in which the prayer of the petitioner should be granted by this Court.

SAMUEL B. BASSETT,

Proctor for Petitioner.

Supreme Court of the United States

October Term 1933

No._____

CHRIS LARSEN, Petitioner,

vs.

NORTHLAND TRANSPORTATION CO., a corporation, Charterer of the American Motor Vessel "NORCO," Respondent.

Brief in Support of Petition for Writ of Certiorari

I.

OPINIONS OF COURTS BELOW

The opinion of the District Court (Ap. 28-31) is reported in 1 Federal Supplement 932, and the opinion of the Circuit Court of Appeals (Ap. 53-60) in 66 F. (2d) 651.

II.

JURISDICTION

1. The decree herein sought to be reviewed was filed and entered on August 21, 1933. (Ap. 61-62).

Petition for rehearing was filed on September 18, 1933, and denied on October 30, 1933, (Ap. 62), and on the same day the Circuit Court of Appeals entered an order staying issuance of its mandate to and including December 4, 1933, to enable your petitioner to apply to this Court for a Writ of Certiorari. (Ap. 62-63).

2. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A., Section 347, providing in part as follows:

> "In any case, civil or criminal, in the Circuit Court of Appeals, * * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment, or decree, by such a lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted Writ of Error on Appeal."

3. The following cases are believed to sustain the jurisdiction of this Court:

Langnes v. Green, 282 U. S. 531, 75 L. Ed. 520; Certiorari granted, 281 U. S. 708, 50 S. Ct. 246, 74 L. Ed. 1131.

American Car & Foundry Co. v. Brassert, 53 S. Ct. 618, 77 L. Ed. __, Certiorari granted, 77 Sup. Ct. Adv. Op. 510.

Flink v. Paladini, 279 U. S. 59, 49 S. Ct. 255, 75 L. Ed. 613; certiorari granted, 278 U. S. 589, 49 S. Ct. 24, 73 L. Ed. 523.

Earle & Stoddard, Inc., v. Ellerman's Wilson Line, 53 S. Ct. 200, 77 L. Ed. __, Certiorari granted, 286 U. S. 535, 52 S. Ct. 498, 76 L. Ed. 1275.

III.

STATEMENT OF THE CASE

A complete statement of the case is given in the foregoing petition and in the opinion of the Circuit Court of Appeals (Ap. 53-55), and, in the interest of brevity, will not here be repeated.

IV.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals misconstrued the decisions of this Court in *Langnes v. Green*, and *Ex Parte Green, supra*, and erred in holding that "the District Court sitting in admiralty has *exclusive* jurisdiction to determine all questions involved in a proceeding for the limitation of liability" *where there is only one claimant and only one owner, and where the owner's right to limit liability is not disputed.*

2. The Circuit Court of Appeals erred in holding that the state court had no jurisdiction to entertain

the claim of the ship owner for limitation of liability *where there is only one claimant and only one owner, and where the owner's right to limit liability was not disputed.*

3. The Circuit Court of Appeals erred in holding that, *in such a case*, the ship owner was under no obligation to submit his claim to limited liability to the state court, and in holding that the judgment of the state court was not *res judicata* as to all issues which might have been submitted for its decision.

4. The Circuit Court of Appeals erred in reversing the decree of the District Court dismissing the respondent's petition for limitation of liability.

V.

QUESTIONS PRESENTED

1. In an action brought in the state court by a seaman against a ship owner to recover damages for personal injuries, *when there is only one possible claimant and only one owner, and when the right of the owner to a limitation of the liability is not disputed*, has the state court jurisdiction to limit the ship owner's liability?

2. *In such a case*, is the ship owner required to plead his right to a limitation of liability as a partial defense in the state court, or may he wait until final

judgment has been rendered against him in that court and then invoke the jurisdiction of an admiralty court?

3. If, having the right to take advantage of the Limited Liability Act in the state court, the ship owner fails to do so, is the judgment of that court on the merits *res judicata* of the issue.

VI.

STATUTES INVOLVED

(1) Section 24 (3) Judicial Code, Title 28, U. S. C. A., Section 41 (3);

(2) Title 46, U. S. C. A., Section 688, Act of March 4, 1915, c. 153, Section 20; 38 Stat. 1185, as amended by Act of June 5, 1920, c. 250, Section 33, 41 Stat. 1007;

(3) Title 46, U. S. C. A., Sections 183, 184, 185, Revised Statutes, Sections 4283, 4284, 4285.

VII.

ARGUMENT

INASMUCH AS THERE WAS ONLY ONE POSSIBLE CLAIMANT AND ONE OWNER, AND THE OWNER'S RIGHT TO LIMIT LIABILITY WAS NOT DISPUTED, THE STATE COURT WAS COMPETENT TO DETERMINE THE VALUE OF THE VESSEL AND ITS PENDING FREIGHT

Both the District Court and the Circuit Court of Appeals accepted *Langnes v. Green*, 282 U. S. 531, 75 L. Ed. 520, and *Ex Parte Green*, 286 U. S. 437, 76 L.

Ed. 1212, *supra*, as conclusive of the issue to be decided, but disagreed in the interpretation to be placed upon these decisions. The same is true of the proctors for the respective parties to this action. We contend, and the District Court held, that inasmuch as there was only one possible claimant and only one owner, and inasmuch as the owner's right to a limitation of liability was not disputed in the state court, that court had jurisdiction, and was in every way competent, to determine the value of the respondent's interest in the "Norco" and to limit its liability accordingly.

The proctors for the respondent contend, however, and the Circuit Court of Appeals held, that *in such a case*

> "the District Court sitting in admiralty had *exclusive* jurisdiction to determine all questions involved in a proceeding for a limitation of liability" (Ap. 57),

and that the respondent, therefore, was not required to claim advantage of the Limited Liability Act by proper pleading in the state court. A mere statement of this issue suggests the necessity for a more careful examination of the decisions referred to.

Langnes v. Green was an action brought by a seaman in the Superior Court of King County, Washington, to recover damages for personal injuries alleged to have been caused by the negligence of the shipowner

and defective appliances and equipment of the halibut vessel "Aloha." The shipowner filed an answer therein denying the allegations of negligence and pleading the affirmative defenses of assumed risk and contributory negligence, which were controverted by the plaintiff's reply. The cause being thus at issue, the plaintiff demanded a trial by jury, and it was assigned for trial. Two days before the trial date, the shipowner instituted a proceeding in the United States District Court for the Western Disrict of Washington, for a limitation of his liability, alleging that the plaintiff's claim in the action referred to greatly exceeded the value of his vessel. An injunction thereupon issued restraining the further prosecution of the action in the state court. The time for filing claims having expired, and the Commissioner having reported to the District Court that the only claim filed was that of Green, and an order of default having been entered against all other claimants, Green moved to dissolve the restraining order, or, in the alternative, to dismiss the petition for limitation of liability, on the ground that the state court had jurisdiction of the case, and, there being only one possible claimant and one owner, the petitioner, therefore, had the right to claim and obtain the advantage and benefit of the Limited Liability Act by pleading the same in his answer in the action pending in the state

court. The District Court denied Green's motion, and on appeal (*Green v. Langnes*, 35 F. (2d) 447), the Circuit Court of Appeals for the Ninth Circuit affirmed the District Court, saying:

> "If the injury occurred from negligence without the privity or knowledge of the owner of the vessel, he was entitled to limit his liability for the injury, to the value of the vessel, although there was only one claimant."

On certiorari this Court reversed the decisions of both lower courts, and approved the reasoning and procedure outlined by Judge Brawley in *The Lotta*, 150 Fed. 219. We quote the language of the Court with reference to the jurisdiction of the state courts:

> "* * * In this situation, while there is some conflict among the decisions of the lower federal courts, this court has accepted the view that, 'in a state court, when there is only one possible claimant and one owner, the advantage of this section (Sec. 4283, U. S. C., Title 46, Sec. 183) may be obtained by proper pleading.' The Lotta (D. C.) 150 Fed. 219, 222; Delaware River Ferry Co. v. Amos (D. C.) 179 Fed. 756; Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 260, 66 L. Ed. 927, 930, 42 S. Ct. 475. See also American S. B. Co. v. Chase, 16 Wall. 522, 532, 533, 21 L. Ed. 369, 372.
>
> "Upon the present record, the necessary result of this holding is that the state court, in the action there pending and in the due course of the exercise of its common-law powers, was competent to entertain a claim of the shipowner for a limitation of liability and afford him appropri-

ate relief under the statute dealing with that subject. Compare Loughin v. McCaulley, 186 Pa. 517, 48 L. R. A. 33, 65 Am. St. Rep. 872,, 40 Atl. 1020."

Commenting on Judge Brawley's decision in *The Lotta*, this Court said:

"After referring to the provision of law saving to suitors the right of a common-law remedy, Judge Brawley said that the plaintiff had the right to pursue his remedy in the state court, unless the act providing for a limitation of liability clearly deprived him of it; that, where there was only a single claim, there was no need for the adoption of the peculiar and exclusive jurisdiction of the admiralty court; and that an answer setting up the limitation of liability would give the shipowner the relief to which he was entitled. It appearing there, as it appears here, that only one claim had been presented, and that the time fixed by the monition had expired, the court said (pages 222, 223, of 150 F.):

" 'The owner of the vessel, therefore, can by answer in the state court set up as a defense that he is not liable beyond the value of the vessel, and that value may be determined as appropriately and as easily in that court as in this. In the ex parte proceedings here the vessel has been appraised by appraisers chosen by the petitioner, and, while there may be no reason to question the fairness and fullness of such appraisement, the plaintiff is entitled to be heard on that question, and in the usual course of the common-law proceeding that issue can be fairly tried. * * *

" 'All that the petitioner can fairly claim is that he should not be subject to a personal judgment for an indefinite amount and beyond the

value of his interest in the Lotta and her freight. There is no reason to doubt that this proper defense may be availed of in the state court, and if there is an ulterior purpose, and petitioner's object in invoking the jurisdiction of this court is to escape a jury trial and take the case away from the common-law jurisdiction, that purpose should receive no countenance here: for the act which gives this court its admiralty and maritime jurisdiction saves to suitors in all cases the right of the common-law remedy where the common law is competent to give it, and good faith requires that this proviso shall have its full and fair effect.'

"Thereupon an order was entered dissolving the injunction against the prosecution of the action in the state court, but retaining the petition for a limitation of liability, for the reason, as the court said, that, 'if it should hereafter appear in the course of the proceedings in the state court that a question is raised as to the right of petitioner to a limited liability, this court has exclusive cognizance of such a question * * * and the decision upon the question of the injunction is predicated upon the assumption that that question is not involved in the suit in the state court, and that the only questions to be decided there are, first, whether the defendant is liable at all, and, if so, as to the value of the vessel and her freight, which is the limit of defendant's liability.' See, also, Delaware River Ferry Co. v. Amos (D. C.) 179 F. 755."

The restraining order was thereupon dissolved and the claimant, Green, was permitted to continue the prosecution of his action in the state court; and the shipowner, pursuant to the holding of this Court,

filed therein an amended answer pleading his right to a limitation of liability. The plaintiff, by his amended reply, however, challenged the *right* of the shipowner to a limitation of his liability by putting in issue the allegations of the answer, that the vessel was seaworthy and that plaintiff's injury was without the privity or knowledge of the owner. The shipowner thereupon obtained an order from the District Court enjoining the further prosecution of the action in the state court. The claimant then filed a motion in this Court asking leave to file a petition for a writ of mandamus against the District Court to show cause why the writ should not issue requiring the judge thereof to conform to the opinion in *Langnes v. Green, supra.* This Court denied the motion, but filed an opinion amplifying its former opinion (*Ex Parte Green*, 286 U. S. 437, 76 L. Ed. 1212), wherein it was further said in part:

> "It is clear from our opinion that the state court has no jurisdiction to determine the question of the owner's right to a limited liability, and that if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jursidiction and dispose of the whole case. * * * *.
>
> "The district court, however, gave Green until a time fixed to withdraw, in the state court, the issue as to the right to limited liability, in which event the restraining order was not to issue. That court, upon being seasonably advised of the

> proceeding here and of our disposition of it, will, no doubt, grant further reasonable time to allow Green to elect whether to withdraw the admiralty issue which he has raised in the state court; and the denial of the motion is made without prejudice to such action."

Following the rendition of this opinion, the claimant withdrew his challenge to the shipowner's *right* to a limited liability, and the state court thereupon limited his liability to the value of the vessel.

We interpret *Langnes v. Green* and *Ex Parte Green*, *supra*, as holding that where there is only one possible claimant against the vessel, the owner desiring to limit his liability may avail himself of that right by proper pleading in the common law court, and that the common law court is perfectly competent to determine the value of the vessel where the *right* to limit liability is not denied, but is not competent to decide the issue where the *right* to limit liability is denied. Indeed, no other interpretation of this Honorable Court's opinion is possible without reading out of the opinion the following passages:

> "In a state court where there is only one possible claimant and one owner, the advantage of this section (the Limited Liability Act) may be obtained by proper pleading." * * * *
>
> "From the present record the necessary result of this holding is that the state court in the action there pending and in the due course of the exercise of its common law powers, is competent

to entertain a claim of the ship owner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject." * * * *

"The owner of the vessel, therefore, can by answer in the state court set up as a defense that he is not liable beyond the value of the vessel and that value may be determined as appropriately and as easily in that court as in this." * * *

"That the only questions to be decided there (in the state court), are, first, whether the defendant is liable at all, and, if so, as to the value of the vessel and her freight, which is the limit of the defendant's liability."

The only passage quoted by the Circuit Court of Appeals from this Honorable Court's opinion in either *Langnes v. Green* or *Ex Parte Green, supra*, is the following:

"It is clear from our opinion that the state court has no jurisdiction to determine the owner's right to a limited liability and that if the *value* of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case." (Ap. 57). (Italics ours).

Commenting on this, the Circuit Court of Appeals asks:

"In what way did the claimant 'accept' the *value* of the vessel as the limit of the owner's liability? He sought and secured a judgment for more than twice the *value* of the vessel, etc.

"The net result of these two decisions (*Langnes v. Green* and *Ex Parte Green*) is that the

> Supreme Court holds that the District Court sitting in admiralty has *exclusive* jurisdiction to determine all the questions involved in a proceeding for the limitation of liability." (Ap. 57). (Italics ours).

Obviously the Circuit Court of Appeals confused "value" and "valuation." This is plain not only from a careful reading of the passages just quoted, but also from the following record in the case: The petitioner's complaint in the state court alleged that the respondent was the "*owner*" of the "*Norco*," and nowhere in its answer did the respondent allege that it was merely a *charterer*, or plead the value of its charter and pending freight, or seek by a "proper pleading" to limit its liability to the value of the charter and the pending freight. Obviously, under these circumstances the petitioner neither could, nor did, challenge the respondent's *right to limit his liability*. Neither did he do anything else to deprive the state court of the jurisdiction which this Honorable Court has repeatedly said that it possessed to "afford him (the respondent) appropriate relief under the statute dealing with that subject." Indeed, the claimant did not even dispute he owner's *valuation* of the vessel, and the Circuit Court of Appeals was entirely incorrect even in stating that,

> "He (the petitioner) sought and secured a judgment for more than twice the value of the vessel,"

because, as stated, the value of the vessel had never even been suggested or referred to in the pleadings in the state court.

Having thus concluded that the jurisdiction of the District Court over all of these issues was *exclusive*, it followed as a matter of course that the state court had no jurisdiction, and it was entirely logical to conclude, as the Circuit Court of Appeals did, that the owner could not be required to litigate his rights in such a court, and could not be held to have waived any of his rights by his failure to do so. We repeat, however, that all of these conclusions, however logically one may flow from the other, are predicated upon the false premise that the state court lost jurisdiction when the claimant disputed the *valuation* which the owner placed on his vessel and her pending freight, even though he did not question his right to limit liability at all.

THE JUDGMENT OF THE STATE COURT IS RES JUDICATA OF RESPONDENT'S CLAIM TO A LIMITED LIABILITY

In support of its conclusion that the issue is not *res judicata* the Circuit Court of Appeals cites several cases, all decided prior to this Court's decision in *Langnes v. Green*, *supra*, where shipowners after judgments had been rendered against them in the

state courts invoked the jurisdiction of the federal courts to limit their liability. In the courts below we contended, and still do, that these decisions all assume that the state courts have no jurisdiction to entertain a shipowner's claim for limitation of liability; and that in none of them was the doctrine of *res judicata* raised. Indeed, this rule was not invoked in those cases for the precise reason that prior to *Langnes v. Green* it was quite generally believed that the state courts had no jurisdiction to limit a ship owner's liability. So many of the lower federal courts had held that the state courts are without jurisdiction to administer the Limited Liability Act that the Circuit Court of Appeals for the Ninth Circuit gave the question but very scant attention when presented in the *Langnes* case, 35 F. (2d) 447.

But this Court, in *Langnes v. Green, supra*, having determined that, in cases involving only one claim and one owner the state courts have jurisdiction to limit a shipowner's liability, the *res judicata* rule is inescapable.

> "*Matters Which Might Have Been Litigated*: A judgment on the merits rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or *defeat* the claim, *but as to every other matter which might with propriety have been*

litigated and determined in that action. A party, therefore, must present in one action all the reasons, grounds and evidence which he may have in support of his claim or *defense.* * * * Again, if a party is brought into a case and has a fair legal opportunity to present and enforce any claim he may have in relation to the subject matter, he must avail himself of it, and whether an original party or an intervenor, he must present his whole case, extending his claim so as to embrace everything which properly constitutes a part of his cause of action or *defense.*" 23 Cyc. 1170-1171. (Italics ours.)

In 2 Black on Judgments, Sec. 731, quoted in the footnotes at 23 Cyc. 1171, the author says:

> "The parties to a suit must make the most of their day in court, and bring forward all claims and demands properly belonging to the cause of action, as well as all their evidence and all *necessary parts of their case or defense, on pain of being barred in a subsequent controversy.*"

The same rule has often been stated and applied by this Court in both civil and maritime causes. In *Grubb v. Public Utilities Commission*, 281 U. S. 470, 74 L. Ed. 972, 979, this Court said:

> "*The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that.* Werlein v. New

Orleans, 177 U. S. 390, et seq., 44 L. Ed. 817, 820, 20 Sup. Ct. Rep. 682; United States v. California & O. Land Co., 192 U. S. 355, 358, 48 L. Ed. 476, 478, 24 Sup. Ct. Rep. 266.

"*As the ground just described was available but not put forward, the appellant must abide the rule that a judgment upon the merits in one suit is res judicata in another where the parties and subject-matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end.* Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 319, 71 L. Ed. 1069, 1071, 47 Sup. Ct. Rep. 600; United States v. Moser, 266 U. S. 236, 241, 69 L. Ed. 262, 264; 45 Sup. Ct. Rep. 66; Cromwell v. Sac. County, 94 U. S. 351, 352, 24 L. Ed. 195, 197." (Italics ours.)

In *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 71 L. Ed. 1069, a seaman who was injured by the fall of a strongback and suffered amputation of his leg, filed a libel in admiralty, alleging that the injury was caused by unseaworthiness and insufficiency of the gear and tackle employed on the vessel. After a trial, the district court held that the accident was not due to the matters alleged, but to the grossly negligent way in which dunnage was taken out of the hold, and that under the decisions no recovery could be had for damages upon that ground. Subsequently, the plaintiff brought an action in the state courts of New York pursuant to the Merchant Marine Act, alleging negligence on the part of the agents and employees of the

shipowner in the control and operation of the vessel and its appliances. The shipowner answered, claiming among other things that the decree in the admiralty case was *res judicata*. This plea was overruled and a trial resulted in a verdict and judgment for the plaintiff. On writ of certiorari this Court held the decree in the admiralty case was a bar to the common-law action, and that the matter was *res judicata*. In so holding, the Court said:

> "The same general doctrine is stated in Stark v. Starr, 94 U. S. 477, 485, 24 L. Ed. 276, 278, that 'a party seeking to enforce a claim, legal or equitable, must present to the court, either by pleading or proof, or both, all of the grounds upon which he expects a judgment in his favor. *He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissable.*' * * * The injured respondent was bound to set forth in his first action for damages every ground of negligence which he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them by piecemeal in successive actions to recover for the same wrong and injury (citing numerous cases).
>
> *"The conclusion that the judgment below must be reversed cannot be avoided without subverting the long established principles of general application, which we are not at liberty to set aside for a special case of hardship."* (Italics ours.)

If this is a fair rule, it must work both ways. In that case, it was applied to the benefit of the shipowner and to the detriment of the seaman. In the case at bar, the shipowner should not be permitted to escape on the ground of "hardship."

Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 66 L. Ed. 927, *supra*, was an action by a seaman against his employer, a shipowner, commenced in the state court, to recover damages for personal injuries. There was only one possible claimant and one owner. The shipowner did not plead in his answer his right to a limitation of liability, but raised the question for the first time by requesting the trial court to instruct the jury that its verdict could not exceed the value of the vessel. In holding that the right to a limited liability was asserted too late, this Court said:

> "Petitioner asked an instruction that Section 4283 of the Revised Statutes (Comp. Stat. Sec. 8021, 6 Fed. Stat. Anno., 2nd ed., p. 336) applied, and that under it, the verdict could not exceed the value of the vessel. In a state court, when there is only one possible claimant and one owner, the advantage of this section may be obtained by proper pleading: The Lotta, 150 Fed. 219, 222; Delaware River Ferry Co. v. Amos, 179 Fed. 756. *Here, the privilege was not set up or claimed in the answer, and it could not be first presented upon request for a charge to the jury.*" (Italics ours.)

If a shipowner cannot claim the right to a limited liability for the first time upon a request for a charge to the jury, it is certainly too late to make such claim after the entry of judgment.

Although *Carlisle Packing Co. v. Sandanger, supra,* was quoted with approval by this Court in *Langnes v. Green* and your petitioner relied upon it in the court below, it was not mentioned in the opinion of the Circuit Court of Appeals.

Where, as in the present case, a shipowner's right to a limitation is not, and cannot, be questioned and, therefore, a remedy is available in the state court, he should not be permitted to institute an independent proceeding in the federal district court at any time, either before or after judgment. If such a practice were sanctioned by this Court there would, indeed, be no end to litigation in cases of this kind. A shipowner or charterer could litigate his liability to the highest court of the state, and if judgment went against him, he could then ask this Court to review the case, and, if still unsuccessful, he could then commence the litigation anew by filing his petition for limitation of liability in the federal district court.

Such practice would not only encourage multiplicity of suits, contrary to the policy of the law, but it would unjustly compel seamen to assume the great expense

incident to a limitation proceeding in the federal court. This is forcefully pointed out by Judge Brown in *The Eureka No. 32*, 108 Fed. 672, cited as authority in *The Lotta, supra*, the reasoning of which in turn has been approved by this Court:

> "One other incident of the independent proceeding under Section 4284 and Rule 55, that operates still further to the prejudice of the injured party, is that the costs and expenses of the proceeding are to be allowed to the shipowner. Thus a fund, already insufficient to make good the injured party's honest demand, is still further depleted by a cumbrous and expensive proceeding. These costs are (a) for a long and costly advertisement calling for imaginary claims having no existence; (b) a commissioner to take proof and report upon these imaginary claims, never to be presented; (c) the appointment of a trustee to take charge of the ship or its proceeds in order to provide for an imaginary pro rata distribution, which will never arise; and, finally, for the other statutory charges in the fee bill, in a proceeding wholly unnecessary and of no benefit to anyone except the shipowner, to enable him to escape a jury trial."

CONCLUSION

In conclusion, it is respectfully submitted that the state court had jurisdiction and was in every respect competent to grant the respondent the relief which it now seeks in the federal court; that the judgment of the state court on the merits is now *res judicata* of the

issue; and, therefore, that the petition for writ of certiorari in this case should be granted.

Respectfully submitted,

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